IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 4, 2008 Session

LAUREN DIANE TEW v. DANIEL V. TURNER, ET AL.

Appeal from the Chancery Court for Jefferson County
No. 05-009 Telford E. Forgety, Jr., Chancellor

No. E2007-02613-COA-R3-CV - FILED JANUARY 29, 2009

Lauren Diane Tew ("Wife") and Gregory R. Turner ("Husband") were co-owners of a one-half interest in two tracts of land located on the Clarence DeBord Farm ("the DeBord property"). The other one-half interest was owned by Edward Michael Turner ("Brother"), who is Husband's brother. Wife filed this lawsuit seeking to have the land sold. Following a mediation, attended by all the parties, an agreed judgment was entered, by the terms of which Brother was awarded what the parties refer to as Tract 1 and a $50,000 interest in what they call Tract 2. Brother later sought to have the agreed judgment set aside, claiming that no agreement had been reached at the mediation and that he did not give his attorney authority to sign the agreed judgment. Following a hearing, at which all of the parties testified, the trial court found that the parties, in fact, had reached an enforceable agreement and that the terms of their agreement were accurately set forth in the agreed judgment. Brother appeals, claiming the trial court erred in not setting aside the agreed judgment. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Carl R. Ogle, Jr., Jefferson City, Tennessee, for the appellant, Edward Michael Turner.

S. Douglas Drinnon and Larry Ray Churchwell, Dandridge, Tennessee, for the appellee, Lauren Diane Tew.

Ronald J. Attanasio, Knoxville, Tennessee, for the appellee, Daniel V. Turner, Personal Representative of the Estate of Gregory R. Turner.

OPINION

I.

This litigation originates from a divorce proceeding between Husband and Wife that was finalized in November 1993. The parties' property settlement agreement provides, in pertinent part, that the one-half interest of Husband and Wife in Tracts 1 and 2 of the DeBord property was to be held by them as equal tenants in common. The other one-half interest in these two tracts was owned by Brother and was not affected by the divorce proceedings.

In January 2005, Wife filed a complaint seeking to sell the property. Wife claimed that the property could not be partitioned and that a sale was, therefore, appropriate. Brother responded to the complaint, claiming that the land could be partitioned. In December 2005, the trial court, with the agreement of the parties, ordered the parties to mediation with attorney Greg O'Connor serving as mediator. The mediation appeared to have been successful as an agreed judgment was signed by the attorneys for all parties and entered by the trial court. Pursuant to the agreed judgment, Brother was awarded all of the fee simple title in Tract 1 of the DeBord property. Tract 2 of the Debord property was to be sold, with Wife and Brother each receiving $50,000 from the proceeds of the sale. The remainder of the proceeds were to go to Husband.

In July 2007, Husband and Wife jointly filed a motion seeking an order enforcing the terms of the agreed judgment. According to Husband and Wife, Tract 2 of the DeBord property had been sold in accordance with the provisions of the judgment. The sale price was $316,250, which "includes the ten percent (10%) buyers premium/fee to Jackson Real Estate and Auction Company." Husband and Wife then signed the necessary documents to transfer title of the property to the buyers. However, they claimed that Brother refused to sign the documents.

Brother responded to the motion to enforce the terms of the agreed judgment and filed a Tenn. R. Civ. P. 60.02 motion seeking to set that judgment aside. Brother claimed that no agreement had been reached at the mediation, that he did not give his attorney authority to sign the judgment, and that he never received a copy of the judgment before it was signed and entered by the trial court.

Following a hearing on Brother's motion to set aside the final judgment, the trial court entered an order stating, in pertinent part, as follows:

> That the Agreed Judgment entered in this matter on November 13, 2006 is a valid Order of this Court; [Brother's] motion to Set Aside Agreed Judgment is denied and [Husband and Wife's] motion for enforcement of the Agreed Judgment is granted.
>
> That [Brother] is hereby Ordered to return any and all original closing documents pertaining to the auction sale of Lot No. 2 of the Clarence

> DeBord Property, in his possession or available to him, to Jefferson Title, Inc. immediately.
>
> That [Brother] is hereby divested of all right title and interest in and to the Lot No. 2 of the Clarence DeBord property. . . .

(Original paragraph numbering omitted.) The trial court then ordered the distribution of the sale proceeds from Tract 2. Wife and Brother each was awarded $50,000 per the terms of the agreed judgment. Husband was awarded $183,507.25, which was the amount remaining after the distributions to Brother and Wife were made and all fees paid.

Brother appeals claiming the trial court erred when it refused to set aside the agreed judgment.

II.

The factual findings of a trial court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); ***Bogan v. Bogan***, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." ***Southern Constructors, Inc. v. Loudon County Bd. of Educ.***, 58 S.W.3d 706, 710 (Tenn. 2001). Our standard of review as to a trial court's grant or denial of a Tenn. R. Civ. P. 60.02 motion for relief from a judgment is set forth in ***Henry v. Goins***, 104 S.W.3d 475 (Tenn. 2003), where our Supreme Court stated as follows:

> In reviewing a trial court's decision to grant or deny relief pursuant to Rule 60.02, we give great deference to the trial court. *See Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993). Consequently, we will not set aside the trial court's ruling unless the trial court has abused its discretion. *See id*. An abuse of discretion is found only when a trial court has "'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). The abuse of discretion standard does not permit an appellate court to merely substitute its judgment for that of the trial court. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

Henry, 104 S.W.3d at 479.

III.

At the hearing on Brother's motion to set aside the final judgment, the first witness was Brother's original attorney, James Hutchins. Hutchins acknowledged that he did not consult with Brother before signing the agreed judgment. As stated by him, the reason for this was because "what is in the order is what we agreed to at mediation . . . ." According to Hutchins' testimony:

> Q. Mr. Hutchins, were you present for the mediation that was ordered by the court which occurred on December the 14th, 2005?
>
> A. Yes
>
> Q. And in that mediation, were you representing [Brother]?
>
> A. Yes.
>
> Q. And Mr. Hutchins, at that time, was there an attempt to compromise and settle claims of [Brother] as they relate to this case?
>
> A. Yes.
>
> Q. And was there ultimately as agreement reached as to his claims?
>
> A. Yes, there was.
>
> Q. And what was that agreement?
>
> A. [The] [a]greement was that [Brother] would receive a deed from [Husband and Wife] to tract number one of the property [and] that he would receive or that he would convey [tract] number two to [Husband and Wife] upon his receiving fifty thousand dollars. . . .
>
> Q. And does that [agreed judgment] accurately reflect the agreement that was reached in mediation December the prior year?
>
> A. Yes. . . .
>
> Q. And Mr. Hutchins, did you forward a copy of that [agreed judgment] to your client . . . ?
>
> A. Yes, I did.

Hutchins testified that at some point, Brother expressed his concern "about he didn't get enough money." Hutchins could not remember if this concern was expressed to him before or after the agreed judgment was entered.

Wife testified that the agreement reached at mediation was that Brother would receive Tract 1, and that Tract 2 would be sold and she and Brother would receive $50,000 from the proceeds of the sale. Wife added that Husband was to receive the remainder of the proceeds from the sale of Tract 2. Wife testified that the agreed judgment accurately reflects the understanding that was reached at mediation. Husband testified consistently with Wife with respect to the parties' agreement.

Brother was the final witness at trial. Brother testified that he never gave his original attorney any authority to sign the agreed judgment because he "wasn't pleased with the mediation." Brother testified that during the mediation, he wanted to keep Tract 1. When asked if there was an agreement as to the amount of money he was to receive from Tract 2, Brother stated "I told him, I said, maybe fifty thousand dollars . . . ." A letter from mediator Greg O'Connor was admitted at trial. In pertinent part, the letter states:

> The above-captioned case was mediated on December 14, 2005. Through the efforts of all parties, all claims of [Brother] were settled. . . .

When the introduction of proof was concluded, the trial court announced its decision from the bench. According to the trial court:

> Bottom line of it is the Court's listened to the testimony and the court is convinced that there was an agreement between these parties at the mediation . . . . Exhibit Three is a letter from the mediator, Greg O'Connor, wherein he says, among other things, "the above captioned case was mediated on December 14th, 2005. Through the efforts of all parties all claims of [Brother] were settled. . . ."
>
> There is testimony here by [Wife], there's testimony here by [Husband], there's testimony here by Jim Hutchins, all saying that yes, we did reach an agreement at the mediation and the -- moreover, all three of those people testify that the Agreed Order of November 13, 2006 is accurate as to the agreements reached with respect to [Brother].

The trial court also took note of Brother's testimony where he claimed that he told his attorney not to sign the agreed judgment because he was not pleased with the mediation. The trial court pointed out that if an agreement was reached, it is "beside the point" if Brother later became unsatisfied with the terms of that agreement. The trial court added that Brother practically confirmed

in his own testimony that an agreement had been reached when he testified that he told his attorney that he wanted to receive all of Tract 1 and that he would take $50,000 from the sale of Tract 2, "which is exactly what the Agreed Order does."

In relevant part, Tenn. R. Civ. P. 60.02 provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. . . .

As stated previously, the issue on appeal is whether the trial court abused its discretion when it refused to set aside the agreed judgment pursuant to Tenn. R. Civ. P. 60.02. ***Henry v. Goins***, 104 S.W.3d 475 (Tenn. 2003). In order to reverse the trial court, we must conclude that the trial court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." ***Henry***, 104 S.W.3d at 479. Our Supreme Court has also offered further guidance:

> Pursuant to Tenn. R. Civ. P. 60.02, a court is authorized to relieve an aggrieved party from a final judgment in limited circumstances. While Rule 60.02 is not limited to any particular type of judgment, the bar for attaining relief is set very high and the burden borne by the movant is heavy. *See Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 624 (Tenn. 2000) (noting "Relief under Rule 60.02(5) is only appropriate in cases of overwhelming importance or in cases involving extraordinary circumstances or extreme hardship.").

Johnson v. Johnson, 37 S.W.3d 892, 895 n.2 (Tenn. 2001).

At the hearing, there was evidence presented from the mediator, Brother's original attorney, Husband, and Wife that an agreement had indeed been reached and that the agreed judgment accurately sets forth the terms of that agreement. Based on the testimony elicited at trial, the proof shows that Brother simply had second thoughts and decided that he wanted more money. This, of course, does not mean that an enforceable agreement had not been reached at the mediation. Given

the overwhelming proof that an agreement had been reached, we are unable to conclude that the trial court abused its discretion when it refused to set the final judgment aside pursuant to Tenn. R. Civ. P. 60.02.[1]

IV.

The judgment of the trial court is affirmed and this cause is remanded to the trial court solely for collection of the costs below. Costs on appeal are taxed to the appellant, Edward Michael Turner, and his surety, for which execution may issue, if necessary, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE

[1] While this appeal was pending, Brother filed a motion seeking to amend his brief to raise an additional issue. That issue is whether the trial court erred by not requiring Husband to produce a particular document signed by Wife. We deny this motion for two reasons. First, the motion comes too late because if we granted the motion, we would have to implement a new briefing schedule and this appeal would essentially start over. Second, Brother acknowledges that this document "has appeared since the [t]rial." Thus, the trial court was not given an opportunity to address the propriety of admitting this document into evidence. We will not consider issues raised for the first time on appeal. *See* ***City of Cookeville ex rel. Cookeville Regional Med. Ctr. v. Humphrey***, 126 S.W.3d 897, 905-06 (Tenn. 2004) (noting the general rule that "questions not raised in the trial court will not be entertained on appeal") (quoting ***Lawrence v. Stanford***, 655 S.W.2d 927, 929 (Tenn. 1983)).